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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 972

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY,

Petitioner,

against

JAVOTTE SUTTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No.

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY,

Petitioner,

against

JAVOTTE SUTTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Public Service Interstate Transportation Company, petitioner, prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above case on November 7, 1946 (R. 282) affirming a judgment entered on a jury verdict in the United States District Court for the Southern District of New York in favor of the respondent against the petitioner.

Opinions Below

No opinion was rendered by the United States District Court for the Southern District of New York. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 279) is reported in 157 F. 2d 947.

Jurisdiction

The judgment of the Circuit Court of Appeals, Second Circuit, was entered on November 7, 1946 (R. 282).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 and upon the grounds that the decision of the Circuit Court of Appeals for the Second Circuit has rendered a decision in this case in conflict with decisions of the Circuit Court of Appeals for the Third Circuit.

Jurisdiction of the United States District Court for the Southern District rested on diverse citizenship.

Questions Presented

1. Whether the Circuit Court of Appeals for the Second Circuit violated the Federal Judiciary Act of September 24, 1789, C. 20, 28 U. S. C. A. S.-725, which provides:

   "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

2. Whether the Circuit Court of Appeals for the Second Circuit made its decision in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit.

3. Whether the Circuit Court of Appeals for the Second Circuit has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

Statutes Involved

1. Federal Judiciary Act of September 24, 1789, C. 20, 28 U. S. C. S.-725, 28 U. S. C. A. S.-725.

2. Seventh Amendment of the United States Constitution.

Statement

In December 1944, respondent herein and plaintiff-appellee in the Court below, obtained a position as a toll collector with the Port of New York Authority and was assigned to the George Washington Bridge which spans the Hudson River, dividing the States of New York and New Jersey, where all toll booths are located on the New Jersey side of the Bridge (R. 22, 23). On March 18, 1945, at 11:30 P. M. she was relieved from duty in her booth on Lane No. 1 and went from that Lane to Lane No. 4 where another toll collector was on duty in a booth at that Lane (R. 24, 25).

The island on which the booths are located is 5 feet 8 inches in width, the width of a booth is 4 feet and the platform adjacent to the roadway on each side is 10 inches, and the island is elevated about 6 inches. The space between the edge of the island and the bulge in front of the storm door is 8¾ inches (R. 18, 29). She was standing on

the curb in front of the door of that toll collector's booth, procuring a bill for some change, when a bus owned by the petitioner herein and the defendant-appellant below, arrived opposite the booth (R. 25, 29); the door of the bus was straight across from the door of the toll booth (R. 30). Plaintiff testified the front of the bus was about one foot away from the curbing and the rear of the bus was right next to the curbing (R. 32). Plaintiff reached into the bus to take the toll from the driver and then resumed her position on the curb, the door of the bus closed and the bus drove away (R. 31, 33, 76). As the bus drove away, the plaintiff was in the process of turning around to hand the toll scrip to the toll collector (R. 32, 79) at which time about the middle of the bus came in contact with the plaintiff (R. 125) and as a result plaintiff sustained injuries. There was no claim or proof that the wheels of the bus mounted the curb of the island. Both plaintiff's feet were on the island at the time of the occurrence (R. 33). She could have stepped off the bus, proceeded to her left and placed herself in front of the booth in one step (R. 80).

Plaintiff had been warned in a safety lecture by the Safety Supervisor of the Port of New York Authority that she should not take up a position along the curb and that she should stand in the doorways and not to go between a booth and a moving vehicle (R. 169, 62, 172). This safety lecture was given in December, some three months before the occurrence (R. 168).

At the end of the plaintiff's case, defendant moved to dismiss the complaint upon the ground that the plaintiff had wholly failed in her burden of proof to show that the defendant was guilty of any negligence, either actively or passively, and that she had failed to prove the allegations of negligence against the defendant as set forth in the complaint and further upon the testimony of the plaintiff herself that she had shown herself to be guilty of contributory negligence (R. 144, 145). The motion was denied (R. 145).

Defendant renewed its motion to dismiss upon the same grounds at the close of the entire case, which motion was likewise denied (R. 245).

Defendant then moved for a direction of a verdict which was also denied (R. 245).

Judge GALSTON, presiding at the trial in the United States District Court for the Southern District of New York then charged the jury (R. 248-253). He instructed the jury that the accident having happened in the State of New Jersey, the law of that State should be applied in determining liability and that if the jury should find that the defendant's driver could have avoided the accident, even though the plaintiff contributed in part to it, then they must find for the plaintiff on the question of liability (R. 251). Exception was duly taken to this portion of the charge by defendant petitioner (R. 254).

The Trial Court, among other things, further charged the jury as follows: "If she needlessly placed herself in a dangerous condition that is to be taken into consideration, but if that dangerous position in which the defendant says she placed herself was known to the driver and he nevertheless sensing that danger proceeded, ignoring the hazardous position in which she was placed, then it is for you to determine whether he acted as a reasonable and prudent driver of that vehicle under all the circumstances prevailing even as described by the driver himself." Exception duly noted (R. 254).

The jury awarded the plaintiff a verdict of $20,000 (R. 257). Defendant's motion to set aside the verdict was denied (R. 257, 258).

The Circuit Court of Appeals, after stating in its opinion that the defendant objected principally to the statement in the Trial Court's charge, "If you find that he could have avoided the accident, even though she contributed in part to it * * *, I say under that assumption then you must

then find for the plaintiff on the question of liability," said that a charge must be interpreted as a whole and not in individual parts. The Circuit Court then held that in substance the Court charged that if the plaintiff placed herself in a dangerous position and the bus driver knew of it, his subsequent negligent conduct thereof might be the proximate cause of the accident and might necessitate a finding for the plaintiff (R. 281).

Specification of Errors to Be Urged

Public Service Interstate Transportation Company, your petitioner herein, urges that the Circuit Court of Appeals for the Second Circuit erred:

1. In failing to respect authoritively declared New Jersey law that the comparative degrees of the negligence of the respective parties will not control the question of liability, but if the plaintiff in any degree contributes to the wrong, he cannot recover.

2. In failing to respect authoritively declared New Jersey law which has expressly repudiated the doctrine of last clear chance.

3. In failing to respect authoritively declared New Jersey law that the duty imposed on the defendant under similar circumstances is to exercise that degree of care a reasonably prudent man would do under like circumstances and not that there is an absolute duty imposed upon the defendant to avoid the accident.

4. In failing to follow the distinction observed in the decisions of the New Jersey State courts between negligence proximately contributing to an accident and negligence which merely creates a remote cause or condition under which the injury was received.

5. In failing to recognize, adopt and apply the decisions of the Circuit Court of Appeals in the Third District which has held that the doctrine of the last clear chance has been expressly repudiated in the decisions of the New Jersey State courts.

6. In failing to respect the Federal Judiciary Act of September 24, 1789 C. 20, 28 U. S. C. A. S.-725.

7. In affirming the judgment of the United States District Court of the Southern District of New York.

8. In failing to respect the Seventh Amendment to the Constitution of the United States.

Reasons for Granting the Writ

The decision upon which the affirmance was entered in the Circuit Court of Appeals for the Second Circuit is in direct conflict with the decisions of the Circuit Court of Appeals for the Third Circuit and the State Courts of New Jersey, for the reason that the Circuit Court of Appeals for the Second Circuit held that even though the negligence of the plaintiff contributed in part to the accident out of which her injuries arose, the jury must find for the plaintiff on the question of liability, thereby eliminating from the consideration of the jury the question of negligent conduct of the plaintiff which was a causative, contributing element in the happening of the accident; it also erroneously adopted and applied the last clear chance doctrine and the doctrine of comparative degress of negligence, both of which have been expressly repudiated by the decisions of the State Courts of New Jersey and which decisions have been followed by the Circuit Court of Appeals for the Third Circuit. Thus, it has erroneously decided a principle of general law which also presents a substantial question not only affecting your petitioner, against whom the jury

awarded a verdict for $20,000 but also many other litigants, and your petitioner feels that the rights granted to it by State law have been lost as a result of the decision of the said Circuit Court of Appeals for the Second Circuit.

WHEREFORE your petitioner prays that this Honorable Court will grant its writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to bring up this case to this Honorable Court for such proceedings thereon as to this Honorable Court may seem just.

Dated: New York, January 31, 1947.

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY, *Petitioner,*

By WILLIAM C. MORRIS,
Counsel for Petitioner.

IN THE

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No.

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY,

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BRIEF IN SUPPORT OF PETITION

POINT I

It was error for the District Court and Circuit Court to hold as a matter of law that if the jury should find that the defendant could have avoided the accident, even though plaintiff contributed in part to it, that under that assumption it must find for the plaintiff.

The general rule prevailing as to the effect of contributory negligence is thus stated in Restatement of the Law of Torts, Vol. 2, Section 467:

> "Except as stated in §§ 479 and 480, the plaintiff's contributory negligence bars recovery against a

> defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him."

Sections 479 and 480, *supra,* concern themselves only with the doctrine of last clear chance.

The Circuit Court of Appeals for the Second Circuit in its opinion states (R. 281):

> "Defendant argues that the District Court's charge on contributory negligence erroneously embodied the doctrine of last-clear chance, which, it says, is repudiated in the New Jersey decisions. It objects principally to the statement, 'If you find that he could have avoided the accident, even though she contributed in part to it * * * I say under that assumption then you must find for the plaintiff on the question of liability.' "

To this portion of the charge exception was duly taken (R. 254). The validity of the charge is to be determined in accordance with the law of the State of New Jersey. This statement grounds itself upon the law of the case as charged by the Trial Judge (R. 249), "* * * so far as the law of this case is concerned, because the accident having happened in the State of New Jersey the law of that State applies in determining liability * * *." This compulsive legal direction is in accordance with the principles of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; 58 S. Ct. R. 817; 82 L. Ed. 1188.

It is settled law in New Jersey that the comparative degrees of the negligence of the respective parties will not control the question of liability, but if the plaintiff in any degree contributed to the wrong, he cannot recover.

The New Jersey Court of Errors and Appeals in *Branigan* v. *Demarest,* 109 N. J. Law 123, 124; 160 A. 319, in applying the apposite principles of law to a case involving a pedestrian who was struck by an automobile, states the

rule to be "If the injury was occasioned in any degree by the plaintiff's own negligence, he is without redress, unless the act of the defendant amounted to a willful trespass or intentional wrong."

In *Dragan* v. *Grossman*, 116 N. J. Law 182; 182 A. 848 (affirmed in Court of Errors and Appeals, 117 N. J. Law 147; 187 A. 373, on the Supreme Court opinion), an automobile accident case, Mr. Justice LLOYD, in the Supreme Court, states:

> "The law of liability in cases of negligence, to the effect that one who complains of the negligence of another cannot recover if his own negligence has in any wise contributed to the wrong, which is made the basis of recovery, is too well settled in this state in actions like the present to call for the citation of authority."

The Trial Judge in the case at bar charged the jury (R. 251):

> "• • • Even though she contributed in part to it • • • you must find for the plaintiff on the question of liability. • • •"

As measured by the above citations, the charge was clearly erroneous and directly in opposition to the well settled law in New Jersey. The instruction referred to and embraced the plaintiff's conduct, and the stated effect of her own negligent conduct was in conjunction with the defendant's guilt of negligence in failing to avoid the accident. The direct consequence of this charge was the withdrawal from the jury's consideration of the legal effect of contributory negligence and a direct instruction that if she was partly responsible for her own injury and for the accident, her own negligent conduct would not, under law, affect her right of recovery. Such an instruction clashes with the law of New Jersey.

In *New Jersey Express Co.* v. *Nichols,* 33 N. J. Law 434, 97 Am. Dec. 722, decided by the New Jersey Court of Errors and Appeals, the Court said at page 439:

> "* * * The injury must be attributable to the defendant's negligence, and to that alone; if occasioned, in any degree by the plaintiff's own negligence, he is without redress."

See also:

Pennsylvania R. R. Co. v. *Righter,* 42 N. J. Law. 180;
Mullen v. *Rainear,* 45 N. J. Law 520.

The above citations clearly indicate that the charge by the Trial Court was contrary to the law of New Jersey.

POINT II

The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit.

As pointed out under Point I, the Trial Judge charged the jury directly contrary to the law of the State of New Jersey, when he charged:

> "If you find that he could have avoided the accident, even though she contributed in part to it * * * then you must find for the plaintiff on the question of liability" (R. 251).

It is submitted that the only possible exception to this general rule of contributory negligence being a complete bar to plaintiff's recovery would be by invoking the doctrine of the last clear chance.

The Circuit Court of Appeals for the Second Circuit, in *Mulberg* v. *The Mason & Dixon Lines, Inc.,* SWAN, *J.,* 157

F. 2d 805, decided November 4, 1946, three days before the decision by the same Circuit Court of Appeals in the case at bar, defined the doctrine of the last clear chance thus:

> "The last clear chance principle means that a defendant who finds himself confronted with a dangerous situation created by the plaintiff's negligence must use such care as is open to him to avoid injuring the plaintiff; and it pre-supposes that he acquired knowledge of the danger in time to have avoided the accident by the exercise of reasonable care."

While in its opinion, the Circuit Court of Appeals in the case at bar did lip service to the repudiation by the New Jersey Courts of the last clear chance doctrine, it is submitted that only by its application can the affirmance of the judgment below herein be justified.

The Third Circuit Court of Appeals ruled that the law of the last clear chance had been repudiated by the highest Appellate Court in the State of New Jersey in the case of *Houston* v. *Del. L. & W. R. Co.*, 274 Fed. 599. This was an appeal by the plaintiff from a judgment for defendant. The action had been brought for wrongful death in the District Court of the United States for the District of New Jersey. The Circuit Court said on page 602:

> "• • • However, that may be, the real question is whether or not any charge should have been made on that point.* This doctrine was first enunciated in the case of Davies v. Mann, 10 M. & W. 545, and is thus stated by the Supreme Court:
>
> 'Contributory negligence of the party injured will will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 429, 12 Sup. Ct., 679, 687 (36 L. Ed. 485).'

* Last clear chance doctrine.

> "But the Court of Errors and Appeals of New Jersey, whose decisions we follow in administering the negligence law of New Jersey, held that, to entitle plaintiff to recover under this doctrine, the defendant's negligence must be so gross as to imply a disregard of conseqences or a willingness to inflict injury. Camden, etc. Railway Co. v. Preston, 59 N. J. Law, 264, 266, 35 Atl. 1119. This general doctrine was further limited by the Circuit Court of Appeals for the Sixth Circuit which held that this rule does not apply—
>
> '* * * to a case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant.' Gilbert v. Erie R. Co., 97 Fed. 747, 752, 38 C. C. A. 408, 413."

And the Circuit Court of Appeals for the Third Circuit in *Lehigh Valley R. Co.* v. *Stevenson,* 17 F. 2nd 748, which involved a New Jersey accident and injury, said at page 749:

> "The learned Trial Judge, correctly instructing the jury on the law of the subject, told them that for the plaintiff to recover under this doctrine* they must find two things: First; that his negligence in putting himself in the place of danger was not concurrent with the negligence of Barker, the defendant's employee, and did not last down to the time of the accident; and the other that the negligence of Barker was so gross as to imply a disregard of consequences or a willingness to inflict injury."

There was nothing in the Judge's charge in the case at bar to bring it within the application of the last clear doctrine as thus narrowly limited by the Third Circuit Court of Appeals. It is therefore respectfully submitted that by its decision in the present case the Circuit Court of Appeals for the Second Circuit is in direct conflict with the decisions of Circuit Court of Appeals for the Third Circuit.

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* Last clear chance doctrine.

We submit that the manner in which the Trial Judge charged the jury on this question was an extremely liberal application of this doctrine. Although the Circuit Court of Appeals in its opinion stated, "The issue of contributory negligence and its effect on the accident was, in view of this and other evidence, likewise a question of fact for the jury," nevertheless the charge of the Trial Court expressly removed the question of plaintiff's contributory negligence and its effect from the jury's consideration. Furthermore, it placed upon the defendant the absolute duty of avoiding the accident.

POINT III

It was error for the Circuit Court to hold in effect that plaintiff's negligence merely created a condition of the happening of the accident.

The Circuit Court of Appeals in its opinion, after stating that the New Jersey laws have in terms rejected the last clear chance doctrine said (R. 281):

> "Nevertheless they have approved the formula that a plaintiff may recover, although negligent, if his negligence is not a proximate cause of the accident, but merely a condition of its occurrence. State (Menger) v. Lauer, 55 N. J. L. 205, 26 A. 180, 184."

The opinion then intimates there is no substantial difference between the last clear chance doctrine and the latter "formula" and states that it believes the charge falls within the latter "formula" when viewed as a whole.

In *Mullen* v. *Rainear,* 45 N. J. Law 520, the Trial Court had charged:

> "'If the plaintiff has been guilty of negligence, though that negligence may, in fact, have contributed to the accident; yet, if the defendant could, in the re-

> sult, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse the defendant.'"

The Supreme Court held that such a charge was error and accordingly reversed the judgment obtained by the plaintiffs. It pointed out the English Rule which had been followed by some of our states but left the question under discussion open and it was not until *Menger* v. *Lauer,* 55 N. J. Law 205, 26 A. 180 was decided that the rule laid down in *Davies* v. *Mann* (*infra*) was expressly repudiated.

In *Menger* v. *Lauer,* 55 N. J. Law 205; 26 A. 180, decided by the New Jersey Supreme Court in 1893, the plaintiff had recovered a verdict for damages to a surveyor's instrument which he had left standing unguarded in the highway, and which had been struck by defendant's horse and wagon which defendant was driving along the highway. The Trial Court had nonsuited, first on the ground that there was no proof of negligence on the part of the defendant, and second, on the ground that the plaintiff was guilty of contributory negligence in exposing the instrument to danger. On certiorari to the Supreme Court by the plaintiff who claimed error in nonsuiting, the judgment was affirmed since both grounds for the nonsuit were held proper.

The plaintiff had urged that even if there was negligence on his part in leaving the instrument on the highway, he was nevertheless entitled to recover as the defendant might have avoided the consequence of plaintiff's negligence by exercising ordinary care, and in support of that the plaintiff relied upon the cases of *Davies* v. *Mann,* 10 Mees. & W. 546, and *Radley* v. *L. & N. W. Ry. Co.,* 1 App. Cas. 754.

In disposing of this contention, the Court reviews and discusses both of the cases cited as well as many other authorities on the subject including some of the English decisions. It seems sufficient to point out that in the analysis of the two cases cited by the plaintiff, the Supreme Court

concludes that *Davies* v. *Mann* (*supra*) does not represent a departure from the earlier authorities making contributory negligence a defense. The *Davies* case, it is said, merely distinguishes between plaintiff's negligence which presently contributes to an accident and the plaintiff's negligence which is too remote to be considered as a proximate cause of the accident. It further concludes that the case of *Radley* v. *L. & N. W. Ry. Co.* (*supra*), does qualify the defense of contributory negligence and introduces the last clear chance doctrine. The New Jersey Supreme Court then sharply criticizes this doctrine and the decision in the *Radley* case and refuses to follow it. While recognizing the distinction between negligence on the part of a plaintiff which contributes to the happening of an accident and negligence on the part of a plaintiff which merely creates a condition under which an accident may occur (in which latter case the plaintiff's negligence is not a defense) the Court says at page 215:

> "In this state the established rule is, that if the plaintiff's negligence contributed to the injury, so that if he had not been negligent he would have received no injury from the defendant's negligence—the plaintiff's negligence being proximately a cause of the injury—he is without redress, unless the defendant's act was a wilful trespass or amounted to an intentional wrong, and in such a case the comparative degree of the negligence of the parties will not be considered. New Jersey Express Co. v. Nichols, 4 Vroom 435; Pennsylvania R. R. Co. v. Righter, 13 Id. 180."

And at page 216, the Court continued:

> "In the trial of cases of this kind, where it appears that both parties were in fault, the primary consideration is, whether the faulty act of the plaintiff was so remote from the injury as not to be regarded in a legal sense as a cause of the accident, or whether the injury was proximately due to the plaintiff's negligence as well as to the negligence of the de-

> fendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not in a legal sense a contributory cause thereof, then the sole question will be whether, under the circumstances and in the situation in which the injury was received, it was due to the defendant's negligence. But if the plaintiff's negligence proximately, that is, directly contributed to the injury, it will disentitle him to a recovery, unless the defendant's wrongful act was wilful or amounted to an intentional wrong. * * *
>
> "In the case in hand the plaintiff's counsel put his case on Davies v. Mann, and especially on Radley v. L. & N. W. Ry. Co. and contended that, no matter if there was negligence on the part of the plaintiff in leaving the instrument on the highway, he was entitled to recover if the defendant might have avoided the consequence of that negligence by exercising ordinary care. This contention cannot be sustained."

It is, therefore, submitted that there is a substantial difference between the doctrine of the last clear chance, as defined by this Court in *Grand Trunk Ry. Co.* v. *Ives, (supra)*; and by the Circuit Court of Appeals for the Second Circuit in *Mulberg* v. *The Mason & Dixon Lines, Inc. (supra)*, and between the dictum that a party may recover, although negligent, if that negligence merely constitutes a condition, as stated in *State (Menger)* v. *Lauer (supra)*, upon which dictum the Circuit Court apparently based its decision in the case at bar.

Another case which clearly illustrates the distinction between a party's negligence which proximately contributes to an accident and a party's negligence which merely constitutes a condition, is that of *Powers* v. *Standard Oil Company*, 98 N. J. Law 730; 119 A. 273, affirmed by the Court of Errors and Appeals, 98 N. J. Law 893; 121 A. 926. In that case, the Standard Oil Company driver parked his truck on the wrong side of a city street. A nine-year-old child attempted to cross the street and ran from behind the truck into the path of another defendant's automobile.

The jury rendered a verdict in favor of the driver of that automobile, but in favor of the plaintiff against the Standard Oil Company and its driver. In reversing this judgment for the plaintiff, the New Jersey Supreme Court held that the parking of the truck on the wrong side of the street, in violation of the New Jersey Traffic Act, was not a proximate cause of the accident, but merely constituted a condition.

POINT IV

The Circuit Court followed an unconstitutional course in affirming the judgment of the Court below, which by its charge, had in effect taken the case from the jury and had directed a verdict in favor of the plaintiff.

Seventh Amendment United States Constitution.

The Trial Court charged the jury as follows (R. 251):

> "If you find that he could have avoided the accident, even though she contributed in part to it • • • then you must find for the plaintiff on the question of liability."

It is respectfully submitted that this portion of the charge withdrew from the jury's consideration the question of plaintiff's contributory negligence; whether or not plaintiff's negligence was a proximate cause of the accident was to play no part in the jury's determination. It also placed upon the defendant the absolute duty of avoiding the accident. Of course, the defendant's driver could have avoided the accident by following various lines of action or inaction. For example, he could have kept his bus at a standstill until the plaintiff had gone off the bridge. But this was not the duty cast upon the defendant. Even under the doctrine of the last clear chance the only duty cast upon the defend-

ant was that he "might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." *Grand Trunk Ry. Co.* v. *Ives, supra.*

The Circuit Court of Appeals in its opinion stated (R. 280):

> "• • • In substance the court charged that, if the plaintiff placed herself in a dangerous position and the bus driver knew of it, his subsequent negligent conduct, if any, might be the proximate cause of the accident and might necessitate a finding for the plaintiff."

The Circuit Court, however, failed to differentiate between the use of the words "might" and the imperative of the Trial Court when it told the jury that it "must" find for the plaintiff, regardless of plaintiff's negligence, if it found that the defendant could have avoided the accident.

The instruction by the Trial Court in the case at bar amounted to a direction of a verdict; the jury under this instruction was precluded from considering whether or not plaintiff was guilty of contributory negligence.

In *Richmond & D. R. R.* v. *Powers,* 149 U. S. 43, 45, 13 S. Ct. 748, 749, 37 L. ed. 642, this Court said at page 45:

> "• • • It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

And in speaking of the jury's function, this Court said in *Tennant* v. *Peoria & P. N. Ry. Co.,* 321 U. S. 29, 33, 64 S. Ct. 409, 412, 88 L. ed. 520, at page 35:

> "The every essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

In *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 67; 323 U. S. 574. This Court said at page 67:

> "No case is to be withheld from a jury on any theory of assumption of risk; and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445."

By its affirmance in the case at bar, the Circuit Court of Appeals for the Second Circuit has established a revolutionary precedent that in negligence cases, whether or not a plaintiff is guilty of contributory negligence, that is of no concern to the jury, and that on the question of liability, the jury must find for the plaintiff except in those cases where the accident is unavoidable.

Conclusion

In its opinion, the Circuit Court of Appeals concludes with the following (R. 281):

> "• • • we are the less disposed to reverse for correction of a highly technical expression of the law, when the essential issues appear to us to have been put before the jury."

It is a fundamental maxim in our philosophy of the law of negligence, that a plaintiff may not recover if he is guilty of contributory negligence, even in the slightest

degree. It is, therefore, respectfully submitted that the Trial Judge made no "highly technical expression of the law" when he charged the jury that it must find for the plaintiff even though she contributed in part to the accident.

Wherefore, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

WILLIAM C. MORRIS,
Counsel for Petitioner.

PHILIP J. O'BRIEN,
JOHN G. COLEMAN,
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THE COURT PRESS, N. Y. C.

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Statement.

The Circuit Court of Appeals, Second Circuit, in a unanimous decision by A. N. Hand, Chase and Clark, Circuit Judges, affirmed a judgment recovered by Javotte Sutton, the respondent, hereinafter called the plaintiff, against Public Service Interstate Transportation Company, the petitioner, hereinafter called the defendant, in an action to recover damages for personal injuries sustained by the plaintiff as a result of being struck by the defendant's bus after a trial before Galston, *D. J.* and a jury in the Southern District of New York.

Respondent's Contention.

We oppose this application because the instruction to the jury by the District Court was in accordance with local law and the affirmance is not in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit.

Facts.

Upon the trial the principal issue tendered by the defendant was that the plaintiff was guilty of contributory negligence in standing on the platform or curbing. It asserted that plaintiff's duty did not call for her presence on the platform or ledge at booth 4. The plaintiff met that issue by showing that it was part of her duty to turn in the proceeds at the end of each day; that to facilitate accounting, currency was sorted in different denominations, and that it was the practice of collectors to go to other booths to get change (R. 22, 24, 103, 116, 118). The defendant also urged that collectors should work only from inside the booths. The plaintiff showed that collectors assigned to such booths, as well as other collectors, or other officers, of the Port Authority, stood on the platform and collected or assisted in collecting tolls (R. 62-64, 98-100, 102, 113-114, 189, 197-198). It was also proven that the driver of the defendant's bus for three years prior to this occurrence averaged five or six trips a day over this bridge and that he was familiar with the toll booths and curbing or platform outside the booths. He testified that on at least one or two or three of his daily trips, he would find someone standing on the curbing outside the booth in the same manner that the plaintiff was standing when he

pulled into lane 4. Ofttimes he saw a sergeant or another toll collector standing on this curbing and he handed the toll to such person. On those occasions, he observed that other toll collectors or officers hand the toll to the toll collector assigned to such lane and he would leave only if they were in a safe position (R. 210, 211). Collectors wear a uniform similar to that of a police officer (R. 22).

Argument.

POINT I.

The instruction to the jury was in accordance with local law.

Since petitioner's Points I, III and IV relate to the District Court's instruction, we shall endeavor to answer such argument under our Point I and show that the instruction to the jury was proper and in accordance with local law.

We contend that the defendant has taken a portion of the instruction from its context and construes such portion without reference to the whole charge.

In Reid's Branson Instruction to Juries, Third Edition, Vol. 1, Chapter 6 entitled "Interpretation and Effect" it is stated:

Sec. 135.

> "An instruction should be considered with reference to the issues, and the evidence pertinent to such issues, as well as all the other instructions. * * *"

Sec. 136.

> "The charge should be construed in its entirety. A part of an instruction may not be taken from its context nor may a single instruction be separated from other instructions given, but they must be construed with reference to the entire charge. The charge is construed in its entirety and not by fragments and isolated phrases and expressions, and where, so considered as a whole, the law is correctly applied to the facts, technical errors and minor inaccuracies should be disregarded where they have no tendency to influence or mislead the jury."

Let us review the charge as a whole. The Trial Court reviewed the issues of the case and told the jury that the plaintiff ascribed her injuries to the negligence of the defendant; that she alleged that such injuries were caused by the negligence of the driver and that his negligence was the proximate cause of her injuries; that the defendant denied that it was in any way negligent and asserted that it was the plaintiff herself by her negligence and by her contributory negligence, which brought about this accident; that the burden was on the plaintiff to prove that the allegations of the complaint are true and that she must do by a fair preponderance of the credible evidence; and that the matter of contributory negligence was one of defense because the occurrence happened in the State of New Jersey and such defense must be proved by the defendant by a fair preponderance of the credible evidence (R. 249). Then, in concise, simple language, the Trial Court reviewed the evidence with respect to liability presented by both parties. Then the Court asked the jury who was at fault? Did the plaintiff sustain her burden

of proof? Did the defendant sustain its burden of proof in respect of contributory negligence? (R. 249, 250).

The Trial Court further charged that there was testimony that not infrequently toll collectors stood on this curbing and indeed, the driver of the bus so admitted. The Court instructed the jury that if she needlessly placed herself in a dangerous position that is to be taken into consideration, but if that dangerous position in what the defendant says she placed herself was known to the driver and he nevertheless sensing the danger proceeded, ignoring the hazardous position in which she was placed, then it was for the jury to determine whether the driver acted as a reasonable and prudent driver of that vehicle under all the circumstances prevailing even as described by the driver himself. If the jury find that he could have avoided the accident, even though she contributed in part to it—the Court does not say she did—then under such assumption they should find for the plaintiff on the question of liability. If it was the plaintiff's negligence which he could not avoid by the exercise of prudent driving, with knowledge of the situation, then the verdict should be for the defendant. If the jury find that the proximate cause of the occurrence was that of the defendant under the instructions given them, then their verdict should be for the plaintiff (R. 251). The jury was instructed that it did not follow that because there was an accident and some injuries sustained by the plaintiff that there can be a recovery (R. 255).

The defendant urges error because the District Court charged:

"If you find that he could have avoided the acci-

> dent, even though she contributed in part to it—I do not say she did; I say under that assumption then you must find for the plaintiff on the question of liability" (R. 251).

However, immediately following that the Court instructed the jury:

> "If it was her negligence which he could not avoid or by the exercise of prudent driving, with knowledge of the situation, why then your verdict would be for the defendant" (R. 251).

The instruction is to be read and understood in the light of the issues on the trial as stated under our Facts. Read not as an isolated phrase but as a whole, the Court said:

> "Now who was at fault? Does the plaintiff sustain her burden of proof? Does the defendant sustain its burden of proof in respect of contributory negligence? I think there has been testimony that not infrequently toll collectors stood on this ledge, and indeed the driver of the bus so admitted. If she needlessly placed herself in a dangerous condition that is to be taken into consideration, but if that dangerous position in which the defendant says she placed herself was known to the driver and he nevertheless sensing that danger proceeded, ignoring the hazardous position in which she was placed, then it is for you to determine whether he acted as a reasonable and prudent driver of that vehicle under all the circumstances prevailing even as described by the driver himself.
>
> "If you find that he could have avoided the accident, even though she contributed in part to it—I do not say she did; I say under that assumption

> then you must find for the plaintiff on the question of liability. If it was her negligence which he could not avoid or by the exercise of prudent driving, with knowledge of the situation, why then your verdict would be for the defendant.
>
> "So those are the considerations which you will doubtless give to the testimony in the case. If you find the proximate cause of this injury was that of the defendant under the instructions I have given you as to the existing law, then your verdict will be for the plaintiff" (R. 250-251).

We submit that the charge construed in its entirety correctly applied the law to the facts. It instructed the jury that the negligent act of the plaintiff, if any, must contribute proximately to the negligence of the defendant before it is a bar to her recovery.

The Circuit Court of Appeals in affirming the judgment said:

> "A charge must be interpreted as a whole, however, and not in individual parts. In substance the court charged that, if the plaintiff placed herself in a dangerous position and the bus driver knew of it, his subsequent negligent conduct, if any, might be the proximate cause of the accident and might necessitate a finding for the plaintiff. True, the New Jersey courts have in terms rejected the last-clear-chance doctrine. *Brennan* v. *Public Service Ry. Co.*, 106 N. J. L. 464, 148 A. 775. Nevertheless they have approved the formula that a plaintiff may recover, although negligent, if his negligence is not a proximate cause of the accident, but merely a condition of its occurrence. *State* (*Menger*) v. *Lauer*, 55 N. J. L. 205, 26 A. 180, 184. If there is a substantial difference between these two theories beyond the

verbal one shown by the formulas themselves, we believe the charge falls within the latter formula when viewed as a whole" (R. 280).

That such decision is in accordance with local law finds support in the very authorities cited by the petitioner on this application.

In *State (Menger)* v. *Lauer,* 55 N. J. L. 205, 26 A. 180, cited by the petitioner, the Court said:

> "If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not in a legal sense a contributory cause thereof, then the sole question will be whether, under the circumstances and in the situation in which the injury was received, it was due to the defendant's negligence."

In *New Jersey Express Co.* v. *Nichols,* 33 N. J. L. 434, 97 Am. Dec. 722, cited by the petitioner, it is stated:

> "In fact, it would be difficult to conceive of any case in which the conduct of the party injured might not, in some sense, be said to have contributed to his injuries. To conclude him from maintaining his action, his conduct must have been negligent, and his negligence must have contributed to the injury in such a way that if he had not been negligent, he would have received no injury from the negligence of the defendant."

In *Pennsylvania R. R. Co.* v. *Righter,* 42 N. J. L. 180, cited by the petitioner, it is said:

> "It is settled, as a part of this rule, that the negligent act of the plaintiff must contribute, proximately, to the injury, else the right of the

plaintiff to recover will not be defeated by such act.

"If, in spite of his negligent act, the injury would have occurred by means of the negligent conduct of the defendant, or if the injury is disconnected from his act by an independent cause, then there is no legal contribution to the injury."

In *Powers* v. *Standard Oil Co.,* 98 N. J. L. 730, 119 A. 273, cited by the petitioner, the violation of the traffic regulation was not a proximate cause of the occurrence and in *Mullen* v. *Rainear,* 45 N. J. L. 520, cited by the petitioner, carrying a heavy weight across a balcony knowing its weak condition constituted contributory negligence.

The defendant's brief speaks again and again, of the plaintiff's contributory negligence but does not refer to any facts in the record to support such charge. On page 4 of the brief, it states that plaintiff had been warned in a safety lecture not to stand on the curbing. That statement would be more correct if it stated that the plaintiff had been warned about the danger in standing on the curbing between the booth and a moving vehicle. It is one thing to warn a collector of the hazards involved, and it is quite another thing to say that such person should not be there. The Circuit Court of Appeals' opinion stated, "Plaintiff had been warned in a safety lecture not to go between the booth and a moving vehicle, but in fact it was often necessary for collectors to step out of their booths and upon the curb to collect the tolls" (R. 280).

A toll bridge is a public highway (Blashfield Cyclopedia of Automobile Law, Vol. 1, Chap. 3). The

plaintiff's job was to collect tolls. It was the defendant's duty to avoid contact with the plaintiff. Police officers or other workmen whose duties require them to be on public highways are not obliged to use the same degree of care that would be required of an ordinary pedestrian whose whole attention is directed to protecting his own safety. See Blashfield Cyclopedia of Automobile Law, Chap. 42, Sec. 1571; *Hughes* v. *English,* 9 N. J. Misc. 28, 152 A. 473; Huddy, 9th Ed., Sec. 106; *Lozio* v. *Perrone,* 111 N. J. L. 549, 168 A. 764.

The defendant asserts on page 4 of the brief that the plaintiff could have stepped off the bus, proceeded to her left and placed herself in front of the booth in one step. Had the driver given her the opportunity to complete the act of giving the scrip to Collector Morrow (the collector assigned to lane 4), and had the driver not started the bus prematurely, the plaintiff, to avoid being struck, would have gone to the west of the booth (referred to as "ahead" at R. 81), not to the left or the east as asserted by the defendant because that is never done (R. 83, 84). The driver was told to "hold it" when the plaintiff took the scrip from him (R. 26, 77). As the bus started, she again cried out "hold it" but the bus kept on going (R. 33). The driver admitted that he was aware of the danger and told the jury that he waited about fifteen seconds before starting the bus and that he made sure that she was in a safe place so that the bus would not strike her. Of course, the jury was free to reject such explanation. The plaintiff had the right to believe that the driver would not operate the bus in any way that would endanger her safety while she was performing her duties as a toll collector. The

driver in his rush to get away was so inattentive that he admits not having heard Collector Morrow shout or blow his police whistle (R. 125, 224) nor did he stop upon hearing the impact (R. 224), and he stopped only after a passenger in his bus hollered "the girl" (R. 225). Nor was the jury required to believe his statement that he was travelling only two or three miles an hour (R. 224). The driver from a starting position travelled fifty-eight feet before stopping (R. 105, 106).

The Circuit Court of Appeals holding that the questions of negligence and contributory negligence were for the jury cited *Byer* v. *H. R. Ritter Trucking Co.*, 131 N. J. L. 199, 35 A. 2d 633, which is strikingly similar, also involving a toll collector, injured while standing on a curbing. We believe that the instruction to the jury was in accordance with local law and that the defendant's contentions under Points I, III and IV are untenable.

In the Circuit Court the defendant urged that the charge was erroneous in that it failed to define negligence, proximate cause and contributory negligence. We believe that it is in answer to that contention that the Circuit Court said "we are less disposed to reverse for correction of a highly technical expression of the law, when the essential issues appear to us to have been put before the jury" (R. 280). The foregoing quotation did not refer to that portion of the charge urged in this Court to conflict with local law.

In any event, it has been stated that for the bulk of ordinary private litigation arising from negligence cases that come into this Court from diversity of citizenship, "the circuit courts of appeals are, and must be, courts of last resort, tribunals of final authority

as to the law of states which lie within their circuit". 48 Harvard Law Review 238, 269, in an article by Frankfurter (Justice) and Hart.

POINT II.

The decision in the case at bar does not conflict with the decisions of the Circuit Court of Appeals for the Third Circuit.

The defendant's contention that the decisions in *Houston* v. *Del. L. & W. R. Co.*, 274 Fed. 599, and *Lehigh Valley R. Co.* v. *Stevenson,* 17 F. 2d 748, decided by the Circuit Court of Appeals for the Third Circuit conflict with the decision in the case at bar, is equally untenable.

The *Houston* case was an action to recover damages for causing death of plaintiff's intestate who was a passenger on defendant's train. The deceased was standing on the steps of a car as the train was nearing a station when in some manner he jumped or fell off, before the train reached the station, resulting in his death. A trainman who saw "an object go by" pulled the whistle cord twice. Defendant's witnesses claimed the train stopped within sixty feet after such signal while the plaintiff claimed the train went much farther. A New Jersey statute barred recovery if a person jumped off a moving train and charged such person with contributory negligence. The plaintiff, in appealing from a jury verdict rendered for the defendant, complained error because of the Trial Court's refusal to charge two requests which, in substance, invoked the last-clear-chance doctrine. The Circuit Court of Appeals in affirming the judgment

said that the Trial Court had substantially covered the points of the requests. Furthermore, the Court said at page 603:

> "The evidence does not show such gross negligence on the part of the defendant, if it really shows any whatever, as to imply a disregard of consequences and a willingness to inflict injury. At most, this was a case of concurrent negligence. We doubt that, under the evidence in this case, the plaintiff was entitled to have the court charge the benefit of the last-clear-chance."

The *Lehigh* case was an action for personal injuries. The plaintiff ran and succeeded in catching the defendant's train and in getting on the rear step when, delaying his ascent to the platform to regain his breath, was swept off by an upstanding girder. The Trial Court submitted the case to the jury on the doctrine of the last-clear-chance because one of defendant's witnesses, Barker, a trainman, testified that several seconds elapsed between his discovery of the plaintiff at the car door, and the instant of the accident and that the jury might find that Barker within that period could have done something to prevent the occurrence. The Court reversed a judgment for the plaintiff and ordered a new trial saying at page 750:

> "The time when Barker first sighted the plaintiff until he was hurt by the girder is variously estimated to have been from two to six seconds. The jury, we think, were left to conjecture what steps Barker in the emergency of the movement, might and should have taken to save the plaintiff after discovering the position of great peril into which he had put himself. 29 Cyc. 434. More than that, they were left to find from the evidence, as

an essential element in the last-clear-chance doctrine, that Barker's action or lack of action amounted to gross negligence or negligence so gross, under the New Jersey rule, as to imply on his part a disregard of consequences or a willingness to inflict injury. We are unable to find anything in Barker's testimony that sustains such a finding. Nor from Barker's testimony can we discover anything to sustain a finding that the plaintiff's act of holding on to the car and running with it was not concurrent with the actions of Barker."

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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February 15th, 1947.